

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT****Dated: 04.07.2017****Coram****WEB COPY****The HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA****S.A(MD)No.186 of 2013****and****M.P(MD)Nos.2 of 2013 and 1 of 2015**

1.Nagarajan (died) .. Appellant/1st Respondent/Plaintiff

2.Kala @ Kalavathy

3.Saravana Ayyappan

4.Kannapiran

5.Sabarinathan .. Appellants 2 to 5/Lrs of the
deceased first appellant

(Appellants 2 to 5 were brought on record as the
legal representatives of the deceased sole
appellant vide order dated 08.02.2017 made
in C.M.P(MD)Nos.11964 to 11966 of 2014)

Vs.

1.Muthuvelayutham (died)

2.Murugesan .. Respondents/Appellant, 2nd Respondent/
Defendants 1 and 2

3.Vijayalakshmi

4.Angulakshmi

5.Devika .. Respondents 3 to 5/Lrs of the deceased
first respondent

(Respondents 3 to 5 along with R.2 were brought on
record as legal representatives of the deceased
first respondent vide order dated 05.06.2017 made
in M.P(MD)No.3 of 2013)

Prayer:- Second Appeal is filed under Section 100 of Civil
Procedure Code against the Judgment and Decree dated 06.02.2012
made in A.S.No.95 of 2008 on the file of the Principal Sub Court,
Dindigul, reversing the Judgment and Decree, dated 17.12.2007 made
in O.S.No.650 of 2006 on the file of the Principal District Munsif
Court, Dindigul.



For Appellants : Mr.H.Lakshmi Shankar

For Respondents : No appearance

JUDGMENT

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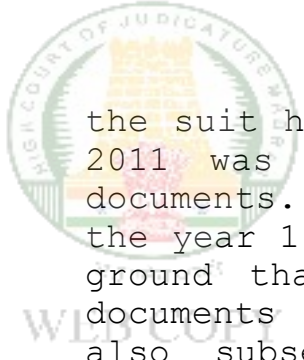
The above second appeal arises against the Judgment and Decree dated 06.02.2012 passed in A.S.No.95 of 2008 on the file of the Principal Sub Court, Dindigul, reversing the Judgment and Decree, dated 17.12.2007 passed in O.S.No.650 of 2006 on the file of the Principal District Munsif Court, Dindigul.

2.The first appellant is the plaintiff and the respondents 1 and 2 are the defendants in the suit. During pendency of the appeal, the first appellant and the first respondent died. Hence, the appellants 2 to 5 were brought on record as legal representatives of the deceased first appellant and the respondents 3 to 5 were brought on record as legal representatives of the deceased first respondent. The plaintiff filed a suit in O.S.No.650 of 2006 on the file of the Principal District Munsif Court, Dindigul, for declaration and injunction.

3.The case of the plaintiff is that the first defendant and the plaintiff are sons of one Saravana Pillai and the second defendant is the son of the first defendant. The suit properties are situate in Survey No.1502/1B to an total extent of 4 acres and 30 cents, out of which, 1 acre and 85 cents belonged to the said Saravana Pillai ancestrally. It is the further case of the plaintiff that the first defendant had been managing the properties as joint family manager and purchased two properties under Ex.A.1 and Ex.A.2 in the year 1967 and 1971 respectively. While so, it is stated that there was a partition in the year 1989 and the plaintiff and the first defendant were allotted 2 acres and 15 cents each on the South and North. At the instigation of the second defendant, the first defendant had given a police complaint in order to take away the lands of the plaintiff also. Hence, the suit.

4.The suit was resisted by the defendants on the ground that the first defendant had been the manager of the suit properties and when his father died, the plaintiff was 5 years old. According to the defendants, the father of the first defendant had only 2 acres of land and majority of the lands have been sold during the life-time of his mother. In fact, the lands owned by the father of the first defendant and plaintiff, never produced any income. The first defendant, who had been a karnam in the Village, had purchased the properties, out of his own earnings and he has been in enjoyment of the same.

5.The trial Court had decreed the suit, however, on appeal,



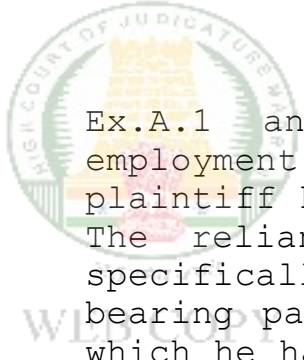
the suit has been dismissed. During the first appeal I.A.No.88 of 2011 was filed by the first defendant for receiving certain documents. The first document is with regard to the partition of the year 1949. The said document was refused to be received on the ground that the same was not completed. So far as the other documents are concerned, they are only kist receipts, which are also subsequent to the filing of the suit. Therefore, the Appellate Court has dismissed the said I.A.No.88 of 2011.

6.The only question that arises for consideration in the present Second Appeal is as to whether the plaintiff is entitled for the relief of declaration of title?

7.Admittedly, the plaintiff's father died, when the plaintiff was 5 years old and the said first defendant had been managing the suit properties as a joint family manager. The plaintiff has been employed as a Teacher and he was not living in the Village. It is the case of the plaintiff that from the income derived from the joint family properties, the suit properties were purchased. Hence, he is also entitled for a share in the said properties. It is further stated by the plaintiff that there was a difference of opinion between him and his brother/first defendant in the year 1989, after which, the parties have been enjoying the properties allotted to them respectively. Though the plaintiff has alleged that the income has been derived from the joint family properties, he has not produced any evidence in support of the same. The plaintiff has also admitted in his evidence that the family was possessed of 8 acres of land, which were sold during the life-time of his mother. When admittedly the plaintiff and the first defendant have divided the properties in the year 1989 and have been enjoying their respective properties allotted in the partition, the plaintiff is claiming exclusive right and title to the suit properties.

8.If at all, there are other properties other than what has been purchased by the first defendant or the family properties available with the first defendant, the only course open to the plaintiff is to file a suit for partition. Once the plaintiff has admitted that there was a division of properties in the year 1989 and they were allotted 2 acres and 15 cents each on the South and North, he cannot have any grievance in the absence of any evidence that he is entitled to a share in the other properties.

9.Even presuming for a moment that the suit properties are the joint family properties in nature, as alleged by the plaintiff, the burden is on him to establish the same. There is absolutely no iota of evidence produced by the plaintiff to show that there were joint family properties, out of which there was an income and the same was utilised by the first defendant for the purchase of the suit properties. Though kist receipts had been produced by the plaintiff, he has failed to establish that the kist receipts are only for the properties which are joint in nature. On the date of purchase of these properties under



Ex.A.1 and Ex.A.2, admittedly, the plaintiff has got his employment and he was earning. It is also not stated that the plaintiff had contributed for the purchase of the suit properties. The reliance is placed on Ex.B.1 wherein the plaintiff has specifically made a mention that Survey No.1502/1B bearing patta No.1100 is with respect to 1 acre and 16 cents in which he has got half share and that he would retrieve the same by filing a civil suit. Assuming for a moment that Ex.B.1 is true, then the genuineness of the partition in the year 1989 cannot be true. The first appellant being the plaintiff cannot take inconsistent pleas in the suit. Even if there are properties which are divided, the only recourse open to the plaintiff is to file a suit for partition and not to file a suit for declaration. The plaintiff has also admitted the title deed under Exs.A.1 and A.2. In fact, the first defendant had claimed right to Exs.A.1 and A.2 which originally belonged to Nallu Pillai and Mahamayee Ammal and it was purchased by the first defendant from them. The trial Court had held that the first defendant had not proved the said fact with convincing evidence and decreed the suit on probabilities. That being so, the plaintiff having come to Court, has to fail or succeed only on his case and cannot pick holes in the case of the defendants. Therefore there is no question of law that has been made out by the plaintiff for consideration in the Second Appeal. Hence, the Second Appeal fails and the same is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To

1.The Principal Sub Court,
Dindigul.

2.The Principal District Munsif Court,
Dindigul.

Copy to:

The Record Keeper,VR Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.H.Lakshmi Shankar, Advocate in SR.No.63448

Ps

AE/KK/SAR2/26.07.2017/4P/5C

**S.A(MD)No.186 of 2013
and**

**M.P(MD)Nos.2 of 2013 and 1 of 2015
04.07.2017**